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No. 58

In the Supreme Court of the United States

OCTOBER TERM, 1966.

W. WILLARD WIRTZ,
Secretary of Labor,
Petitioner,

vs.

LOCAL UNION NO. 125, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

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No. 1117.

In the Supreme Court of the United States

OCTOBER TERM, 1966.

W. WILLARD WIRTZ,
Secretary of Labor,
Petitioner,

vs.

LOCAL UNION NO. 125, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The order of the Court of Appeals is reported unofficially at 56 L. C. ¶ 11,781 and found at pp. 9-10 of the petition. The opinion of the district court striking portions of the complaint is reported at 231 F. Supp. 590 and set forth at pp. 11-22 of the petition. The opinion of the district court sustaining the motion of the Secretary of Labor for summary judgment with respect to the remaining portions of the complaint is reported unofficially at 53 L. C. ¶ 11,213 and set forth at pp. 23-42 of the petition.

JURISDICTION.

The judgment of the court of appeals was entered on December 15, 1966 (App. A of petition). The petition for a writ of certiorari was filed on March 3, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether an unchallenged intervening union general election renders moot an action by the Secretary under Title IV of the Labor-Management Reporting and Disclosure Act of 1959, to set aside a prior union election which was not challenged by any union member.

2. Whether the exhaustion of internal remedies provided by the Act is a prerequisite to the Secretary's exercise of power to institute an action to invalidate an election.

STATUTE INVOLVED.

The relevant statutory provisions are set forth in Appendix F to the petition for writ of certiorari in *Wirtz v. Local 153, Glass Bottle Blowers Association, etc.*, No. 1115, filed March 3, 1967. Also involved is Section 601(a) of the Act, 73 Stat. 539, 29 U. S. C. § 521(a), set forth in Appendix F, p. 19, *infra*.

STATEMENT OF THE CASE.

On June 8, 1963 respondent Union held its general election of officers. The office of Business Representative was not filled because the votes for two nominees resulted in a tie. A run-off election was held on July 13 to resolve the tie.



An unsuccessful candidate filed a protest with the international union claiming irregularities in the conduct of this run-off election. He had not raised any objection to the prior general election of June 8, 1963. After a hearing the international union determined that the irregularities shown did not affect the outcome of the election and turned down the charges. The candidate thereafter filed a protest with the Secretary claiming that the run-off election had been conducted in violation of the Union's constitution and bylaws.

Following an investigation the Secretary brought an action on February 7, 1964 in the district court to invalidate the challenged run-off election of July 13, 1963, as well as the earlier election of June 8, 1963. The complaint alleged that irregularities affected the outcome of both elections, and a new general election under the supervision of the Secretary was sought pertaining to all union offices (Appendix A, pp. 11-15, *infra*).

On March 4, 1964 the Union moved to dismiss that part of the complaint seeking to declare null and void the June 8, 1963 general election of officers. The District Court (Connell, C.J.) granted this motion, holding that the Secretary was precluded from attacking this election because the union member had not complained about this election, and thus failed to exhaust internal union remedies (App. B of petition). On August 19, 1964 the Union answered the remaining part of the complaint not affected by the district court's ruling.

Thereafter, on April 18, 1966, the district court (Battisti, J.) granted the Secretary's motion for summary judgment respecting the remaining portion of the complaint directed to the run-off election of July 13, 1963 for the office of Business Representative. It ordered the next scheduled election for Business Representative to be conducted under the Secretary's supervision with the winner to serve a full constitutional term (Appendix B, p. 15, *infra*). The Union did not appeal from this judgment.

The Union's next regularly scheduled election of officers was held on June 11, 1966. The election of Business Representative was held at the same time and place under supervision of the Department of Labor as directed by the district court. The Union's election judges requested the attendance of the Secretary's representatives during the general election of officers and they remained until all ballots were counted and the winners announced (Appendix D, pp. 17-18, *infra*). The successful candidate was certified to the district court (Appendix E, pp. 18-19, *infra*).

On June 10, 1966 the Secretary filed notice of appeal from the orders of July 14, 1964 dismissing the portion of the complaint challenging the general election, and of April 18, 1966 granting the Secretary's motion for summary judgment. The Union filed its motion to dismiss in the court of appeals on August 20, 1966. On December 15, 1966 the court of appeals entered its order, holding that the union officers held their positions pursuant to the June, 1966 general election, and this fact rendered moot the question on appeal. To prevent the district court decision from serving as precedent, it vacated the judgment of the district court dismissing a portion of the Secretary's suit, and remanded with instructions to dismiss the entire

complaint as moot insofar as it related to the 1963 general election (App. A of petition).

ARGUMENT.

I.

There Is No Conflict of Decision.

The June, 1966 general election held at the same time and place as the supervised election for Business Representative, was not affected by any irregularity. Indeed, the Secretary conceded this by stating in the petition: "* * * there is no evidence in the record as to whether the violation continued to 1966 * * *" (p. 4). None of the deficiencies which affected the run-off election in July, 1963 were present at the supervised election in June, 1966.

The Secretary suggests that persons not eligible to vote in the supervised election for Business Representative "could have voted" at the same time and in the same hall, in the unsupervised general election (footnote 1, p. 4 of petition). This is not the fact. Individuals found not eligible to vote in the supervised election were not permitted to vote in the general election (Appendix D, pp. 17-18, *infra*).

The District Court directed a supervised election, recognizing that "many practical problems were involved" (App. C of petition, p. 42). Election details were worked out carefully between the Secretary's representatives and the Union's officers (Appendix D, pp. 17-18, *infra*). The results were certified on July 7, 1966 by the Acting Secretary of Labor (Appendix E, pp. 18-19, *infra*). It is not likely that the Secretary would certify that the supervised part of the election was conducted in accordance with the Act, and remain silent if there had been irregularity with respect to other parts of the election events.

It is clear therefore that the present union officers hold office as a result of an intervening unchallenged election in 1966. Their right to office for a full constitutional term should not be jeopardized by irregularities existing in the 1963 election. To recognize the asserted 1963 irregularities would mean setting aside the unchallenged June, 1963 election, despite the intervening 1966 general election, and repeating the elaborate nominating and election procedures under the Secretary's supervision with the outcome in no way affected by what occurred four years before. This is wholly unnecessary and would serve no remedial purpose. For, as was stated in *Wirtz v. Local Unions 410, etc., Int'l. Union of Operating Engineers,* 366 F. 2d 438, 442 (CA-2, 1966):

> "* * * It would serve no practical purpose with respect to these locals to declare their 1962 elections void because the terms of office thereby conferred have expired. And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific violation, * * * we conclude that we have no power to afford the Secretary relief and therefore that these cases are moot."

This reasoning was approved and followed by the Court of Appeals for the Third Circuit in the *Glass Bottle Blowers* case (Appendix A of petition in *Wirtz v. Local 153, Glass Bottle Blowers Association, etc.,* No. 1115, October Term, 1966), and was followed by the Court of Appeals for the Sixth Circuit in this case. There is no conflict among the courts of appeals on this issue and the Secretary does not contend that there is.

II.

The Decision Below Is Clearly Correct.

The court of appeals accepted the Union's argument that setting the 1963 election aside and directing a supervised election would "serve no purpose here in the light of the subsequent election which has been held" (App. A, p. 10 of petition). It also adopted the Secretary's suggestion that if the case was moot, it should be remanded "to the district court with directions to vacate the July 13, 1964 decision * * * and to dismiss as moot those portions of the complaint which are addressed to the union's general election of officers held June 8, 1963" (Secretary's Response to Motion to Dismiss Appeal, p. 12, court of appeals proceedings). This is what the court below did, relying upon this Court's decision in *United States v. Munsingwear*, 340 U. S. 36 (App. A, p. 10 of petition), and it was clearly correct in doing so.

III.

The Question Involved Is No Longer Important in the Administration of the Act.

The exhaustion of remedies provided by the Act is a prerequisite to the Secretary's exercise of power. This was the view of the district court in the instant case and of the courts of appeals in *Wirtz v. Local Unions 410, etc.*, 366 F. 2d 438 (CA-2, 1965), and *Wirtz v. Local Unions No. 9, etc.*, 366 F. 2d 911 (CA-10), App. A, p. 11 of petition in No. 1116, October Term, 1966.

The exhaustion requirement may indeed restrict the Secretary's remedial power but Section 402 of Title IV of the Act is self-limiting. It provides that only when the union member "has exhausted the remedies available under the constitution and bylaws" may he file a complaint

with the Secretary. The Secretary investigates "such complaint" and if he finds probable cause to believe that an unremedied violation occurred, he may file suit against the union. Pending a court decision, the challenged election is "presumed valid" and the union's affairs continue to be conducted by the officers elected in the challenged election. Title IV, § 402, 29 U. S. C. § 482.

No claim of any violation was made by the member concerning the Union's June, 1963 general election. The tie votes cast for Business Representative caused the July run-off election, and triggered the protest by the unsuccessful candidate about irregularities in the latter contest only. The Secretary sought however to set aside the unchallenged June election as well as the second contest to resolve the tie and elect the Business Representative.

When the district court sustained the Union's motion to dismiss that portion of the complaint directed to the June, 1963 election (App. B of petition, pp. 11-22), it was faithful to the legislative history of the Act and the statutory scheme enacted to carry out the intent of Congress. The legislative history is conclusive that as a precondition to the Secretary's action, "* * * the member must show that he has pursued any remedies available to him within the union and any parent body in a timely manner." S. Rep. No. 187, 86th Cong., 1st Sess. (1959), p. 21; *Calhoon v. Harvey,* 379 U. S. 134, 140.

The statutory scheme is not affected by the complaining member's ability to file "a carefully drafted complaint." However artless the complaint may be worded, if internal remedies are to be followed it is necessary that unions be given the opportunity to correct irregularities. Congress deliberately set forth a procedure to be followed. Had it wished to entrust the Secretary with an open-end power it would have done so, as it did in the National

Labor Relations Act, for example, where the power to issue a complaint is not limited by an exhaustion procedure, but rather by a time limitation that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *," Section 10(b), 61 Stat. 146, 29 U. S. C. § 160(b); *Local Lodge No. 124 v. N. L. R. B.*, 362 U. S. 41.

The reasoning of the district court below in refusing to permit the Secretary to expand the base of protest was cited with approval in *Local 57, Int'l. Union of Operating Engineers v. Wirtz*, 346 F. 2d 552, 554 (CA-1, 1965). The Court of Appeals for the First Circuit held that the power to set aside a union election "is conditioned upon the filing of a complaint by an individual union member who has exhausted his internal union remedies." The court went on to distinguish between the statutory limitations on the Secretary's power to *initiate* court action to vacate an election under Section 402, and his power to investigate union elections under Section 601 (Appendix F, p. 19, *infra*). *Wirtz v. Local 191, Int'l. Bh'd. of Teamsters*, 321 F. 2d 445, 448 (CA-2, 1963), followed.

It is not unreasonable to restrict the Secretary to the issue complained of as a condition for the exercise of power.[1] If Congress believed otherwise it would not have presumed the challenged election to be valid and allowed elected union members to hold office.

The Secretary waited until June 1966 to appeal from the 1964 judgment limiting relief to the office of Business

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[1] *Wirtz v. Local Unions No. 406, etc.*, 254 F. Supp. 962, 967 (D. C. La. 1966); *Wirtz v. Local Union No. 9, Int'l. Union of Operating Engineers*, 51 L. C. § 19,579 (D. C. Col., 1965); *Wirtz v. Local Union 169, Int'l. Hod Carriers', etc.*, 246 F. Supp. 741, 751 (D. C. Nev. 1965); Cox, "*The Role of Law in Preserving Union Democracy*," 72 Harv. L. Rev. 609, 633.

Representative. This ruling was a "final decision," 28 U. S. C. § 1291, and, "Under § 1291 an appeal may be taken from any 'final' order of a district court," *Gillespie v. U. S. Steel Corp.*, 379 U. S. 148, 152. In the early construction of the Act a timely appeal from the district court's judgment for a speedy resolution of the question involved would not have been inconvenient and the cost insignificant. There would then be no occasion for the delay now complained of by the Secretary. *Cf. United States v. Munsingwear*, 340 U. S. at 40, 41. The issue of law is now settled.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MORTIMER RIEMER,
Counsel for Respondent Union.

Of Counsel:
ROBERT J. CONNERTON.

April, 1967.

APPENDIX A.

COMPLAINT.

I.

Plaintiff brings this action under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (Act of September 14, 1959, 73 Stat. 519 *et seq.*, 29 U. S. C. 401 *et seq.* (1958 ed. Supp. IV)), hereinafter referred to as the Act.

II.

Jurisdiction of this action is conferred upon the Court by Section 402(b) of the Act (29 U. S. C. 482(b)).

III.

Defendant Local Union No. 125, International Hod Carriers' Building and Common Laborers' Union of America, hereinafter referred to as Defendant Local, is and at all times relevant to this action has been, an unincorporated association maintaining its principal office at 29 Fifth Avenue in the City of Youngstown, County of Mahoning, State of Ohio, within the jurisdiction of this Court.

IV.

Defendant Local is, and at all times relevant to this action has been, a local labor organization engaged in an industry affecting commerce within the meaning of Sections 3(i), 3(j) and 401(b) of the Act (29 U. S. C. 402(i) and 402(j) and 481(b)).

V.

Defendant Local, purporting to act pursuant to and in accordance with the constitution of the International Hod Carriers' Building and Common Laborers' Union of America, hereinafter referred to as the International, and Defendant Local's constitution, conducted an election of officers which consisted of an election held on June 8, 1963 and a run-off election for the office of Business Representative on July 13, 1963. Said elections were subject to the election provisions of Title IV of the Act.

VI.

By letter dated August 11, 1963, a member in good standing of Defendant Local, acting pursuant to and in accordance with the International's constitution and the constitution of Defendant Local filed a protest and appeal to the General Executive Board of the International Union concerning the conduct of the July 13, 1963 run-off election. Having received a final denial of his protest by the General Executive Board by letter dated December 2, 1963 the member on December 9, 1963 filed a timely complaint with the plaintiff herein, alleging violations of Section 401 of the Act (29 U. S. C. 481), all in accordance with Section 402(a) of the Act (29 U. S. C. 482(a)).

VII.

Pursuant to Section 402(b) of the Act (29 U. S. C. 482(b)), Plaintiff proceeded to investigate said complaint and, as a result of facts shown by said investigation, found probable cause to believe that violations of Title IV of the Act had occurred with respect to both elections referred to in paragraph V and had not been remedied at the time of institution of this suit, and that such violations may have affected the outcome of said elections.

VIII.

Defendant Local violated Title IV of the Act regarding the elections conducted on June 8, 1963 and July 13, 1963 in the following respects:

(a) Defendant Local failed to provide adequate safeguards to insure a fair election on June 8, 1963, in violation of Section 401(c) of the Act (29 U. S. C. 481(c)) by permitting unauthorized ballots to be used and counted and by failing to provide adequate safeguards.

(b) Defendant failed to conduct the elections of June 8, 1963 and July 13, 1963 in accordance with its aforesaid applicable constitutional provisions, in violation of Section 401(e) of the Act (29 U. S. C. 481(e)), as follows:

(1) Members not in continuous good standing were permitted to be candidates in the elections of June 8, 1963 and July 13, 1963;

(2) Members delinquent in dues for April, 1963 were permitted to vote on June 8, 1963;

(3) Members who had not completed payment of readmission fees were permitted to vote on June 8, 1963;

(4) Members who had not paid the constitutionally required readmission fees were permitted to vote on June 8, 1963;

(5) Members delinquent in dues for May, 1963 were permitted to vote at the July 13, 1963 run-off election;

(6) Members who had not completed payment of readmission fees were permitted to vote at the July 13, 1963 run-off election;

(7) Members who had not paid the constitutionally required readmission fees were permitted to vote at the July 13, 1963 run-off election.

IX.

The violations of Section 401 of the Act (29 U. S. C. 481) found and alleged above may have affected the outcome of the elections of June 8, 1963 and July 13, 1963.

WHEREFORE, Plaintiff prays for judgment.

(a) declaring the following elections to be null and void;

i. the election of its officers held by Defendant Local on June 8, 1963;

ii. the run-off election held for the office of Business Representative held on July 13, 1963;

(b) enjoining and restraining Defendant Local, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with them from concealing, selling, conveying, transferring, or otherwise disposing of any property or assets belonging to said defendant or in which it has any direct or indirect interest until further order of the Court;

(c) directing the conduct of a new election of officers under the supervision of the plaintiff;

(d) for the costs of this action; and

(e) for such other relief as may be appropriate.

APPENDIX B.

ORDER.

(Entered April 18, 1966.)

Upon consideration, after argument by opposing counsel,

IT IS ORDERED that plaintiff's motion for summary judgment, with regard to that portion of his complaint directed to the run-off election of July 13, 1963 for the office of Business Representative, is hereby granted.

IT IS FURTHER ORDERED that the run-off election conducted by the defendant on July 13, 1963 for the office of Business Representative is hereby declared to be null and void and set aside; that the next regularly scheduled election for the office of Business Representative will be held under the supervision of the plaintiff, as provided for in Section 402(c) of the Act (29 U. S. C. 482(c)) and in accordance with the Act and defendant's uniform local constitution as long as they are not inconsistent with the provisions of the Act; that after such election has been held, the ballots canvassed and results announced, the successful candidate will be installed in office as defendant's Business Representative for a full constitutional term of office; that this action will hold on the docket of this Court pending completion of the nomination, election and installation of the officer elected as hereby ordered; and that after completion of the nomination and election of said officer, if plaintiff certifies to the Court that said election was conducted in accordance with the provisions of the Act and defendant's constitution so long as they are not inconsistent with the provisions of the Act, the Court may thereupon, upon approval of such certification, enter a judgment declaring that such person has been elected to said office.

FRANK J. BATTISTI,
United States District Judge.

APPENDIX C.

ORDER.

(Entered July 22, 1966.)

It appearing to the Court that pursuant to an order of this Court dated April 18, 1966, the defendant has conducted a new election for the office of Business Representative under the supervision of the plaintiff, and that the plaintiff has filed a certification of election, certifying the name of the person who was elected to such office in such election, and further certifying that the new election was conducted in accordance with the provisions of Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (29 U. S. C. 481 *et seq.*) and in conformity with the constitution and bylaws of the defendant labor organization, so far as lawful and practicable; and the Court having considered said certification and being fully advised, it is, upon motion of the plaintiff, hereby

ADJUDGED, ORDERED, AND DECREED that Andrew Jackson, the person named in the certification of election filed as aforesaid by the plaintiff is the duly elected officer of the defendant labor organization for the designated office listed therein, and for a full constitutional term of office.

FRANK J. BATTISTI,
United States District Judge.

APPENDIX D.

AFFIDAVIT OF MARTIN M. MASON.

(Forming Part of Motion to Dismiss in Court of Appeals.)

MARTIN M. MASON, being first duly sworn, deposes and says that he resides at 618 North Loveless Avenue, in the City of Youngstown, Ohio and that he is and has been at all times pertinent hereto, the Secretary-Treasurer of Laborers' International Union of North America, Local No. 125.

Your affiant says further that Laborers' International Union of North America, Local No. 125, held its general election of officers on June 11, 1966 from 9:00 A.M. to 7:00 P.M. at its hall at 29 Fifth Avenue, Youngstown, Ohio, and that a special election for the office of Business Representative was conducted on the same day under the supervision of the Department of Labor.

Joseph D. Caiola, Rocco DeMarco, Charles S. Mato and Richard A. Crino represented the Department of Labor in supervising the election for Business Representative and observed and assisted during the general election of officers at the request of the election judges. The representatives handled the eligibility lists and in several instances determined that members were not eligible to vote. These members did not vote in either election. The representatives also supervised the distribution of ballots with election judges, handing out ballots for both elections. Department representatives also assisted members who could not read, in the voting booth and in depositing ballots in the box.

The ballots cast in the election for Business Representative were counted first and this count was completed at approximately 9:00 P.M. Thereafter, the representatives of the Department of Labor stayed and observed the

counting and tally of ballots cast in the general election and the declaration of results. The representatives left after all ballots were counted and the election judges announced the winners.

MARTIN M. MASON.

(Jurat omitted.)

APPENDIX E.

CERTIFICATION OF ELECTION.

The nominations and election having been conducted in the above matter under the supervision of the Secretary of Labor, United States Department of Labor, pursuant to an Order entered by the Court on the eighteenth (18) day of April 1966, and the said nominations and election having been conducted in accordance with the provisions of Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (29 U. S. C. 481 *et seq.*) and in conformity with the constitution and by laws of the defendant labor organization so far as lawful and practicable, therefore:

Pursuant to Section 402(c) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U. S. C. 482(c)).

IT IS HEREBY CERTIFIED that the following named candidate has been duly elected to the office designated:

Andrew Jackson Business Representative.

As part of this Certification, the following exhibits are attached hereto, which are true copies of the documents in the record of the holding of the election:

Exhibit A. Memorandum from Mr. Frank M. Kleiler, Director, Office of Labor-Management and Welfare-Pension Reports, United States Department of Labor, reporting on the supervision of the election.

Exhibit B. Copy of Notice of Election.

Exhibit C. Interpretation of Article VII, Section 6 of the Hod Carriers' Uniform Local Union Constitution rendered by the General President.

Exhibit D. Certification on Conduct of Election.

Exhibit E. Copy of Official Tally Sheet.

Exhibit F. Certification on Tally of Ballots.

Signed at Washington, D. C., this 7th day of July, 1966.

/s/ JOHN F. HENNING,

Acting Secretary of Labor.

APPENDIX F.

STATUTES INVOLVED.

Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 539, 29 U. S. C. 521.

TITLE VI. MISCELLANEOUS PROVISIONS.

INVESTIGATIONS BY SECRETARY.

(a) The Secretary shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this chapter (except subchapter II of this chapter) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto. The Secretary may report to interested persons or officials concerning the facts required to be shown in any report required by this chapter and concerning the reasons for failure or refusal to file such a report or any other matter which he deems to be appropriate as a result of such an investigation.